SUPREME COURT, U. S.
Supreme Court, U. S.
FILED
MAR 13 1974
MICHAEL RODAK, JR., CLERK

No. 73-826

In the Supreme Court of the United States

OCTOBER TERM, 1973

E. ROSS KING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the trial court erred in allowing his former attorney to testify as to certain corporate transactions, although no objection was made to the testimony. He further contends that the court below employed an improper standard of review in upholding the trial court's denial of his motion for a judgment of acquittal.

After a jury trial in the United States District Court for the District of Colorado, petitioner was convicted of misapplication of the funds of a bank of which he was a director, in violation of 18 U.S.C. 656 (Count 1), and of aiding and abetting the misapplication of bank funds, in violation of 18 U.S.C. 2 and 656 (Count 2).[1]

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[1]Co-defendant Paul King, petitioner's brother, was also charged in both counts. He pleaded guilty to Count 1 prior to trial. The Count 2 charge against him was dismissed.

Petitioner was sentenced to concurrent terms of 50 months' imprisonment, with 48 months suspended and two months to be served in a work release program, and was fined $2,500.

Count 1 of the indictment charged petitioner and his brother, Paul King, as directors of the Kiowa State Bank, with having caused a $50,000 loan to be disbursed to Apple Cross Farms and Maddison Farms, which sum was ultimately converted to the personal use of petitioner and his brother. Count 2 charged petitioner with having aided and abetted Paul King in misapplying bank money by causing $25,000 to be disbursed to one A. Paul Williams, of which sum $19,516 was ultimately converted to the personal use of petitioner and his brother.[2]

Petitioner's argument that it was plain error for the court to allow his former attorney to testify for the government was properly rejected by the court below, which found that it was part of petitioner's trial strategy not to object to the attorney's testimony in hope that facts adduced on cross-examination might tend to exonerate him (Pet. App. 7a). Moreover, his failure to claim the attorney-client privilege constitutes a waiver. *United States* v. *Gurtner*, 474 F. 2d 297, 299 (C.A. 9); *Young* v. *Taylor*, 466 F. 2d 1329, 1333, n. 1 (C.A. 10); *Love* v. *United States*, 386 F. 2d 260, 265 (C.A. 8), certiorari denied, 390 U.S. 985.

2. Petitioner also contends that the court below utilized an improper standard of review in determining that the trial court correctly denied petitioner's motion for a judgment of acquittal on Count 2. Attack-

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[2]The charges and evidence are set forth in detail in the opinion below (Pet. App. 2a-4a).

ing the so-called "waiver doctrine," petitioner argues that the appellate court should have reviewed only the record as it stood at the end of the government's case-in-chief, when the motion for acquittal was made. This Court need not reach that issue because, as detailed in the opinion below (Pet. App. 4a-7a), a *prima facie* case had been established as to Count 2 at the end of the government's case-in-chief.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1974.

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[3]The court below also noted that the government in its case-in-chief proved the commission of the Count 1 offense (Pet. App. 8a).